Fresh & Green's of Washington, D.C., LLC *and* United Food and Commercial Workers, Local 400. Case 05–CA–065595

August 29, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON AND SCHIFFER

On June 28, 2013, the Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB No. 145 (2013). Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the Board issued an order setting aside the Decision and Order, and retained this case on its docket for further action as appropriate.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we have considered de novo the judge's decision and the record in light of the exceptions and briefs. We have also considered the now-vacated Decision and Order, and we agree with the rationale set forth therein.[1] Accordingly, we affirm the judge's rulings, findings, and conclusions and adopt the judge's recommended Order[2] to the extent and for the reasons stated in the Decision and Order reported at 359 NLRB No. 145, which is incorporated herein by reference.

Dated, Washington, D.C. August 29, 2014

Mark Gaston Pearce, Chairman

Harry I. Johnson, III, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] The judge found that the General Counsel established under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 495 U.S. 989 (1982), that the Respondent unlawfully discharged employee Maria Yliquin for her protected conduct as a shop steward. The Respondent excepts to this finding, claiming, in part, that the General Counsel failed to show that the Respondent harbored animus toward Yliquin's activities as a steward because the Respondent did not discharge another steward, employee Sally Crabb. In rejecting that argument, the judge noted that Crabb "may not have been as aggressive in that position as Yliquin." We need not rely on the judge's inference. Instead, we apply the well-established principle that "[a] discriminatory motive, otherwise established, is not disproved by an employer's proof that it did not take similar actions against all union adherents." *Master Security Services*, 270 NLRB 543, 552 (1984); see also *Conley Trucking*, 349 NLRB 308, 323 fn. 38 (2007), enfd. 520 F.3d 629 (6th Cir. 2008) (citing *NLRB v. Nabors*, 196 F.2d 272, 276 (5th Cir. 1952)).

Member Johnson concurs with his colleagues that the Respondent violated Sec. 8(a)(3) and (1) by discharging both employees Maria Yliquin and Esam Amireh, but with two important caveats.

Regarding Amireh's discharge, the General Counsel was required to demonstrate, as part of his prima facie case under *Wright Line*, that the Respondent, through Store Manager Mary Huffman, had knowledge that Union Representative Richard Wildt brought Amireh's scheduling concerns to Huffman both on Amireh's behalf and at his request. Because the record confirms this knowledge, Member Johnson joins his colleagues in finding the violation.

Moreover, the Respondent argues that Huffman had discretion concerning whether to hire/retain Yliquin (and Amireh) when the D.C. store changed ownership, and that Huffman's decision to retain Yliquin (and Amireh) belies any antiunion animus. This argument essentially raises the same-actor inference from Title VII law, under which courts assume that where the same person does the hiring and termination of an employee, the discharge was not likely to have been because of an unlawful discriminatory motive. See *Tellepsen Pipeline Services Co. v. NLRB*, 320 F.3d 554, 569–570 fn. 4 (5th Cir. 2003) (finding in a Sec. 8(a)(3) case that the same-actor inference "is not implicated by the facts" but noting that it "has been applied only in [the] context of race, gender, and age discrimination cases").

In Member Johnson's view, consideration of the same-actor inference should not be foreclosed in the Board's traditional discrimination analysis. For instance, where the nature and extent of an alleged discriminatee's union or protected concerted activity was the same at the time of hire and at the time of discharge, and the same person controlled both the hiring and the termination decisions, the same-actor inference might well apply. However, the inference would not apply in this case because the hiring decision was actually made on a corporate-wide basis by more highly-placed individuals. While store managers such as Huffman might have been able to argue—perhaps even successfully—in favor of individual exceptions to a blanket hiring decision, such influence is not the functional equivalent of the same person having discrete hiring and discharge authority with respect to a particular employee such as Yliquin or Amireh. Further, the inference would not apply here because the protected activity at issue generally occurred after the Respondent made the decision to hire Yliquin and Amireh.

[2] In adopting paragraphs 2(c) and 2(d) of the Board's June 28, 2013 Order, we rely on *Don Chavas LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). In addition, we substitute the attached notice in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the United Food & Commercial Workers, Local 400, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Maria Yliquin and Esam Amireh full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Maria Yliquin and Esam Amireh whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL compensate Maria Yliquin and Esam Amireh for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Maria Yliquin and Esam Amireh, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

FRESH & GREEN'S OF WASHINGTON, D.C., LLC

The Board's decision can be found at www.nlrb.gov/case/05-CA-065595 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.